Supreme Court of the United States

No. 72-5581

RICHARD GUY STEFFEL,

Petitioner,

—v.—

JOHN R. THOMPSON, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Record from the United States District Court for the Northern District of Georgia	
Docket entries	1
Complaint filed October 16, 1970	5
Exhibit A	13
Exhibit B	14
Exhibit C	17
Stipulation filed October 28, 1970	18
Answer of defendants Thompson and Hand, filed November 2, 1970	22
Answer of defendants Hudgens & Reynolds, filed November 9, 1970	29
Order of January 8, 1971	34
Order of January 18, 1971	35

Record from the United States District Court for the Northern District of Georgia—Continued — Page

Order of March 19, 1971 — 36

Judgment, March 24, 1971 — 42

Notice of appeal filed April 28, 1971 — 43

Proceedings in the U.S.C.A. for the Fifth Circuit — 44

Opinion, Dyer, J., May 8, 1972 — 44

Concurring opinion, Tuttle, J. — 50

Opinion, per curiam—denying the petition for rehearing, July 20, 1973 — 56

Judgment, filed July 31, 1972 — 61

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari — 62

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Civil Docket 14260

Jury demand date:

INJUNCTION

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center

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(Hudgins & Reynolds)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 10-16-70	Clerk	15.00	Oct. 16, 1970	American Civil Liberties Union of Ga.	15.00	
J.S. 6 3-24-71	Marshal	19.80	Oct. 19, 1970	Treas. U.S. Dep.	.35	15.00
Basis of Action: Complaint for declaratory & injunctive relief—to declare unconstitutional Ga. Code Annotated Sec. 26-1503 (Acts 1968, pp. 1249 et seq.), etc. (rt. to handbill & protest War in Vietnam): gtd. by U.S. Constitution.	Docket fee	5.00				
	Witness fees					
	Depositions					

DOCKET ENTRIES

DATE	PROCEEDINGS
1970	
Oct. 16	Complaint for declaratory and injunctive relief (class action), (with Exhs. A, B & C), praying for temporary restraining order, for preliminary & permanent injunction, and to declare Ga. Code Ann. Sec. 26-1503 unconstitutional as applied to pltfs.' first amendment activities, etc.—filed. Summons issued & delivered to Marshal.
	Hearing set on matter of temporary restraining order for Tues., 10-20-70, at 4:00 P.M. at Rome, Ga. (Parties advised) rms
20	Above hearing not had; reset for Wed., 10-28-70 at 10 A.M. in Atlanta. (Parties present when reset)

DATE	PROCEEDINGS
Oct. 20	Pltfs.' motion for a temporary restraining order, with affidavits of SANDRA LEE BECKER, WILLIAM R. GIGNILLIAT, III, and brief in support of motion—filed. rms
26	Brief of defts. Thompson & Hand in opp. to mot. for t.r.o, filed. mjw
27	Brief in support of pltfs' motion for preliminary & permanent injunction & declaratory relief, filed. To AJH by counsel. jwe
28	Marshal's returns of service as to John R. Thompson & F. D. Hand, executed 10/21/70; as to D. Scott Hudgins, Jr. & G. T. Reynolds, executed 10/22/70. hds
	HEARING: Pltf's petition for temporary restraining order. Counsel for parties entered into certain stipulations. Stipulations, filed. CASE SUBMITTED TO COURT. pwm
27	Brief of defendants, filed. To AJH. jar
Nov. 2	ANSWER of defts. THOMPSON & HAND, filed. To AJH. jwe
	Supplementary brief of defts. THOMPSON & HAND, filed. To AJH. jwe
9	ANSWER of defts HUDGENS & REYNOLDS, filed. To AJH. jar
19	steno notes of procedings had 10-28-70, filed jfe
Dec. 4	Pltfs. motion for temporary stay of proceedings and brief, filed. To AJH. jwe
1971	
Jan. 8	ORDER staying pltfs. prayers for injunctive & declaratory relief pending the decision of Supreme Court in the following cases, Samuels vs. Mackell, Dyson vs. Stein, Pacific Indemnity Co. vs. Acel Delivery Service, Inc. & O'Hair vs. Paine; case is stayed until further order of the Court, filed. (Copy to counsel) pwm

DATE	PROCEEDINGS
Jan. 19	Pltfs' motion for a decision, with brief, filed. To AJH. jwe
	ORDER denying pltf's motion to vacate Courts prior order staying all further procedings, filed. (Copy to counsel). To AJH. pwm
Mar. 19	Order DENYING pltfs' prayers for injunctive & declaratory relief, filed. jwe
24	JUDGMENT filed & entered that the pltfs. take nothing, that the action is hereby dismissed, and that the defts. recover of the pltfs. their costs of action. jwe (Copy of order & judgment to counsel). jwe
	Transcript of proceedings had 10-28-70 received from AJH & filed. jwe
Apr. 23	Pltf's. (Richard Guy Steffel) Notice of Appeal, with motion for leave to appeal in forma pauperis, affidavit of poverty, and
	Order allowing said pltf. to prosecute appeal in forma pauperis, filed. (Copy to counsel & U. S. Court of Appeals). jwe
May 27	FILE MAILED TO U.S.C.A. with exhibits via registered mail RRR. (Ack). jfe
1972	
July 31	Certified copy of judgment from USCA *affirming* judgment of USDC with copy of Opinion, filed. Copy to counsel. (file & exhibits returned) lkn
1973	
Mar. 20	Pltfs' request to transmit and file certified copy of record to USSC, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF—
Filed October 16, 1970

1. The Jurisdiction of the Court arises under Title 28, U.S.C. 1343, and Title 42, U.S.C. 1983, *et sequitur.*

2. Declaratory relief is also sought pursuant to the jurisdiction conferred upon the Court under Title 28 U.S.C. 2201 and 2202.

3. This is a class action brought by plaintiffs on their own behalf and on behalf of all others similarly situated, to declare unconstitutional as applied Georgia Code Annotated § 26-1503 (Acts 1968, pp. 1249 et seq.), to enjoin criminal prosecutions against plaintiff Sandra Lee Becker, and further to enjoin defendants from further enforcement of the aforesaid statute so as to interfere with activities of the plaintiffs that are protected by the First and Fourteenth Amendments to the Constitution of the United States.

4. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pur-

suant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class is no numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protest the interests of the class. In addition, the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Parties

5(A) Plaintiff Sandra Lee Becker, a minor, suing by Louis D. Becker, her father and next friend, is an 18 year old citizen of the United States and of the State of Georgia residing in the Northern District of Georgia;

(B) Plaintiff Richard Guy Steffel, a minor, suing by Raymond C. Steffel, his father and next friend, is an eighteen year old full-time student at Georgia State University, and is a citizen of the United States and of the State of Georgia residing in the Northern District of Georgia;

(C) Plaintiff Atlanta Mobilization Committee is an unincorporated association of approximately 50 active members engaged in educational and organizing efforts to influence and change United States policy in Southeast Asia.

(D) Plaintiffs are all, individually, in association with each other, and in association with various organizations, dedicated to securing equal civil and legal rights for all persons who peacefully and non-violently oppose United States policy in Vietnam and Southeast Asia in accordance with the guarantees of the Constitution and the laws of the United States and the State of Georgia.

6(A) Defendant John R. Thompson is sued individually and in his official capacity as Solicitor of the Civil and Criminal Court of DeKalb County. He is charged

with the enforcement and administration of the challenged statute of DeKalb County.

(B) Defendant F. D. Hand is sued individually and in his official capacity as the Chief of Police of DeKalb County. Chief Hand is charged with the initial enforcement of the challenged statute in the unincorporated area of DeKalb County, Georgia.

(C) Defendant D. Scott Hudgens, Jr. d/b/a North DeKalb Shopping Center is sued individually and in his capacity as owner of the shopping center.

(D) Defendant G. T. Reynolds is sued individually and in his capacity as manager and agent of North DeKalb Shopping Center. Defendant Reynolds swore out the warrant for the arrest of Plaintiff Becker under the challenged statute.

Facts

7. The North DeKalb Shopping Center is a large, modern retail shopping center located in a partially residential, partially small business area in the unincorporated portion of DeKalb County, Georgia, approximately 4 miles from the city of Decatur, Georgia. The center is bounded on the east by the Lawrenceville Highway, U.S. 29, a large, heavily traveled multi-lane highway, and on the north by North Druid Hills Road. There are two entrances to the center from the Lawrenceville Highway. There are three streets that lead from North Druid Hills Road into the center's paved parking area. The center covers approximately three acres, including about forty-five acres of open, paved parking facilities for more than 2,000 automobiles. The center has a perimeter of approximately one mile.

8. The center has more than 50 commercial tenants, including small shops, major department stores, and a chain grocery store. Most of the said stores are located within a covered mall area with entrances to the stores leading from the covered mall area. Other stores are located outside the enclosed area and have separate en-

trances from the approximately 12 foot wide sidewalk that surrounds the mall. The center is open to the general public during business hours through approximately 12 entrances either through the tenant stores or through the center's unlocked doors.

9. On October 8, 1970, the plaintiffs, and others, individually and as representatives of the Atlanta Mobilization Committee, stood on an exterior sidewalk of the North DeKalb Shopping Center and distributed handbills inviting people to "March Against the War." (A copy of said handbill is attached hereto and marked "Exhibit A.") From on or about 8:00 p.m. until on or about 8:30 p.m. on the aforesaid date the distribution was quiet, peaceful, orderly, and did not interfere with the selling activities of the shopping center, and there was no littering. The shopping center's maintenance man and Security Guard told plaintiffs that they would have to cease their distribution and leave. When the plaintiffs explained that they were exercising their Constitutional rights, the Security Guard called the police. Three DeKalb County Police cars arrived, and one of the DeKalb County Policemen told plaintiffs that they had been told to stop distribution and that if they did not leave they would be arrested if a warrant were sworn out against them by the Shopping Center. The plaintiffs left to avoid arrest.

10. On October 10, 1970, the plaintiffs, individually and as representatives of the Atlanta Mobilization Committee, again stood on an outside walkway of the shopping center and distributed the same handbills and another handbill asking persons to boycott lettuce at the Colonial Store located at the Shopping Center. (A copy of said bandbill is attached hereto and marked "Exhibit B.") From on or about 10:30 a.m. until on or about 2:30 p.m. on the aforesaid date, the distribution was quiet, peaceful, orderly, did not interfere with the selling activities of the shopping center, and there was no littering. The Security Guard and the Manager of the

shopping center told plaintiffs that they would be arrested unless they ceased their distribution of the handbills and left the premises. Defendant Reynolds, the manager of the shopping center, called the DeKalb County Police Department. Two police cars arrived, and a DeKalb County Policeman told plaintiffs that they had been asked to stop their activities and to leave and that if they did not they would be arrested. Plaintiff Steffel left to avoid arrest. Plaintiff Becker declined to leave and was arrested on a charge of criminal trespass, Ga. Code Ann. § 26-1503. At all times during this handbilling the plaintiffs were exercising rights under the (1st Amendment to the) Constitution of the United States.

11. Plaintiff Becker was arrested and charged with "Criminal Trespass", a violation of Ga. Code Ann. § 26-1503, a statute of the State of Georgia. (A copy of said statute is attached hereto and marked "Exhibit C.") At the time of said arrest Plaintiff Becker in an orderly and peaceful manner was engaged in the distribution of leaflets. Plaintiff Becker was incancerated in the DeKalb County Jail until she was released on $200.00 bond. Her appearance for preliminary hearing is scheduled for Thursday, October 22, 1970, in the Civil and Criminal Court of DeKalb County, and her arraignment is scheduled for November 2, 1970.

12. Since the arrest of Plaintiff Becker, Plaintiff Steffel, other members and representatives of the Atlanta Mobilization Committee, and other members of Plaintiff's class have desired to return to the shopping center to distribute handbills but have been stopped from doing so because of fear of being arrested and charged with a violation of criminal trespass under Ga. Code Ann. § 26-1503.

13. Upon information and belief, other plaintiffs and members of their class will be arrested by defendants or their agents and charged with violation of said statute if the aforementioned handbilling activity continues.

14. Upon information and belief, the sole purpose of the defendants in enforcing the said statute was to intimidate, punish and harass plaintiffs and others of their class for exercising their rights to freedom of speech, petition, press and lawful protect.

15. At all times hereinabove mentioned, the defendants acted under color of the statutes, ordinances, regulations, customs, or usage of the State of Georgia.

Causes of Action

16. The statute which the defendants seek to enforce against Plaintiffs is unconstitutional as applied in that it abridges the plaintiffs' right of expression, press and lawful protest, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. Specifically, plaintiffs have been denied their right to handbill and protest peaceably against the War in Vietnam and the United States' foreign policy in Southeast Asia.

17. Ga. Code Ann. § 26-1503, as applied herein, violates plaintiffs' rights to freedom of speech, press, and protest as guaranteed them by the First and Fourteenth Amendments to the United States Constitution.

18. Ga. Code Ann. § 26-1503 as applied abridges free expression in that it chills and deters plaintiffs' rights of free speech as guaranteed by the First and Fourteenth Amendments by inhibiting the future exercise of rights guaranteed under the First and Fourteenth Amendments of the United States Constitution in that the threat of criminal arrest and prosecution will deter future peaceable handbilling in DeKalb County, Georgia.

Equity and Irreparable Injury

19. There is between the parties an actual controversy as hereinbefore set forth. The plaintiffs and those similarly situated are suffering irreparable injury and are threatened with irreparable injury in the future by rea-

son of the acts herein complained of in that a substantial loss or impairment of freedom of expression would occur if plaintiffs must await the State Court's disposition and ultimate review in the Federal Court of any adverse determination. Furthermore, the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution unaffected by prospects of its success or failure.

20. Plaintiffs have no plain, adequate, or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action. Any other remedy to which the plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, involve a multiplicity of suits, and cause further irreparable injury, damage and inconvenience to the plaintiffs and to those similarly situated.

Prayer

21. Wherefore, plaintiffs respectfully pray:

A. That this court issue a temporary restraining order restraining the defendants, their agents, employees, successors, and persons acting in concert or cooperation with them:

(1) from continuing the prosecution for "Criminal trespass" under Ga. Code Ann. § 26-1503 in any manner against plaintiff Sandra Lee Becker.

(2) from instituting, or threatening to institute criminal proceedings against plaintiffs or members of their class for violations of Ga. Code Ann. § 26-1503 of the State of Georgia.

(3) from harassing, intimidating or taking any other action against the plaintiffs or members of their class in connection with their peaceful handbilling activities through the area of the shopping center's exterior sidewalk and enclosed mall.

B. That after opportunity for hearing, this court issue a preliminary and permanent injunction against application of Ga. Code Ann. § 26-1503 to plaintiffs and their class, restraining and enjoining defendants, their agents, employees, successors, and persons acting in concert with them from further arresting, instituting proceedings against, prosecuting or in any way harassing plaintiffs or the members of their class in the exercise of their constitutionally protected rights of lawful and peaceful protest and specifically of peaceful handbilling in the area known as The North DeKalb Shopping Center or the shopping center mall;

C. That this court declare Ga. Code Ann. § 26-1503 unconstitutional as applied to the plaintiffs' first amendment activities as described herein;

D. That the court grant plaintiffs their costs and such other and further relief as may be equitable and proper.

Respectfully submitted,

/s/ William R. Gignilliat, III

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Attorney for Plaintiffs

Please Serve:
William R. Gignilliat, III

[Verification (omitted in printing)]

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

EXHIBIT C

26-1503. Criminal trespass.—(a) A person commits criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is $100 or less, or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

(b) A person commits criminal trespass when he knowingly and without authority:

(1) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, for an unlawful purpose; or

(2) Enters upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person, or within the vehicle, railroad car, aircraft, or watercraft of another person, after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor.

(Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS

—vs—

JOHN R. THOMPSON, ET AL., DEFENDANTS

STIPULATION—Filed October 28, 1970

It is hereby stipulated by and between the above-entitled parties for use in the above-captioned legal proceedings by their respective attorneys that:

1. Plaintiff Sandra Lee Becker, a minor, suing by Louis D. Becker, her father and next friend, is an 18 year old citizen of the United States and of the State of Georgia residing in the Northern District of Georgia.

2. Plaintiff Richard Guy Steffel, a minor, suing by Raymond C. Steffel, his father and next friend, is an 18 year old full-time student at Georgia State University, and is a citizen of the United States and of the State of Georgia residing in the Northern District of Georgia.

3. Plaintiff Atlanta Mobilization Committee is an unincorporated association of approximately 50 active members engaged among other things in educational and organizing efforts to influence and change United States policy in Southeast Asia and its principal place of business is in Atlanta, Georgia, and in the Northern District of Georgia.

4. Defendant John R. Thompson is the Solicitor of the State Court of DeKalb County and is charged with the enforcement and administration of the challenged statute in DeKalb County, Georgia.

5. Defendant F. D. Hand is the Chief of Police of DeKalb County, Georgia, and is charged with the initial enforcement of the challenged statute in the unincorporated area of DeKalb County, Georgia.

6. Defendant D. Scott Hudgens, Jr., d/b/a North DeKalb Shopping Center, is the owner of said shopping center.

7. Defendant G. T. Reynolds is the manager of North DeKalb Shopping Center; is the agent of D. Scott Hudgens, Jr., and is the individual who swore out the warrant for the arrest of plaintiff Sandra Lee Becker.

8. The North DeKalb Shopping Center is a large, modern retail shopping center located in a partially residential, partially small business area in the unincorporated portion of DeKalb County, Georgia, approximately 4 miles from the city of Decatur, Georgia. The center is bounded on the east by the Lawrenceville Highway, U.S. 29, a large, heavily traveled multi-lane highway and on the north by North Druid Hills Road. There are two entrances to the center from the Lawrenceville Highway. There are three streets that lead from North Druid Hills Road into the center's paved parking area. The shopping center and parking facilities cover approximately 50 acres of which about forty-five acres is open, paved parking facilities for approximately 3,000 automobiles. The center has a perimeter of approximately one mile.

9. The center has more than 50 commercial tenants, including small shops, major department stores, and a chain grocery store. Most of the said stores are located within a covered mall area with entrances to the stores leading from the covered mall area. Other stores are located outside the enclosed area and have separate entrances from the approximately 12 foot sidewalk that surrounds the mall. The center is open to the general public during business hours through approximately 12 entrances either through the tenant stores or through the center's unlocked doors.

10. On October 8, 1970, the plaintiffs, and others, individually and as representatives of the Atlanta Mobilization Committee, stood on an exterior sidewalk of the North DeKalb Shopping Center and distributed handbills inviting people to "March Against the War." From on or about 8:00 p.m. until on or about 8:30 p.m. on the aforesaid date the distribution was quiet, peaceful, orderly, and did not interfere with the selling activities

of the shopping center. There was no unreasonable littering in relation to the number of handbills distributed. The shopping center's maintenance man and security guard told plaintiffs that they would have to cease their distribution and leave. When the plaintiffs explained that they were exercising their Constitutional rights, the security guard called the police. Three DeKalb County Police cars arrived, and one of the DeKalb County Policemen told plaintiffs that they had been told to stop distribution and that if they did not leave they would be arrested if a warrant were sworn out against them by the Shopping Center. The plaintiffs left to avoid arrest.

11. On October 10, 1970, the plaintiffs, individually and as representatives of the Atlanta Mobilization Committee, again stood on an outside walkway of the shopping center and distributed handbills. From on or about 10:30 a.m. until on or about 2:30 p.m. on the aforesaid date, the distribution was quiet, peaceful, orderly; did not interfere with the selling activities of the shopping center. There was no unreasonable littering in relation to the number of handbills distributed. The security guard and the manager of the shopping center told plaintiffs that they would be arrested unless they ceased their distribution of the handbills and left the premises. Defendant Reynolds, the manager of the shopping center, called the DeKalb County Police Department. Two police cars arrived, and a DeKalb County Policeman told plaintiffs that they had been asked to stop their activities and to leave, and that if they did not they would be arrested. Plaintiff Steffel left to avoid arrest. Plaintiff Becker declined to leave and was arrested on a charge of criminal trespass. Ga. Code Ann. § 26-1503.

12. Plaintiff Becker was arrested and charged with "Criminal Trespass," a violation of Ga. Code Ann. § 26-1503, a statute of the State of Georgia. (A copy of said statute is attached hereto and marked "Exhibit A".) At the time of said arrest plaintiff Becker in an orderly and peaceable manner was engaged in the distribution of handbills. Plaintiff Becker was incarcerated in the DeKalb County Jail until she was released on $200.00 bond. Plaintiff Becker appeared for a preliminary hear-

ing on Thursday, October 22, 1970, and was bound over to the State Court of DeKalb County, Georgia. Her arraignment is scheduled for the first Monday in December, 1970.

13. Plaintiffs and other members of their class will be asked to cease their handbilling activities, warrants will be sworn out against them, and they may be arrested by defendants or their agents and charged with violations of said statute if the aforementioned handbilling activity continues.

14. At all times hereinbeforementioned, the defendants acted under color of the statutes, ordinances, regulations, customs, or usage of the State of Georgia.

Dated this 28th day of October, 1970.

/s/ William R. Gignilliat, III

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center, DEFENDANTS

ANSWER OF DEFENDANTS THOMPSON AND HAND—
Filed November 2, 1970

FIRST DEFENSE

Plaintiffs have failed to state a claim against Defendants Thompson and Hand upon which relief may be granted.

SECOND DEFENSE

Plaintiffs, who here seek equitable relief, have not themselves done equity. Plaintiffs Becker and Steffel accompanied by Attorneys Gignilliat and Myer went to North DeKalb Shopping Center for express purposes of testing the validity of Ga. Code Anno. 26-1503. Arrest was welcomed so that a suit might ensue. Thus Plaintiffs have no standing here at equity to contest the validity of 26-1503.

THIRD DEFENSE

Plaintiffs for purposes of equitable relief have waived their claims as to the constitutional merits of Ga. Code Anno. 26-1503 on the facts alleged in their Complaint since Plaintiffs wilfully sought an arrest of one of their members under the statute involved here.

FOURTH DEFENSE

Defendants Thompson and Hand now respond to the separate Paragraphs of Plaintiffs' Complaint as follows:

1.

These Defendants admit personal jurisdiction over Defendants Thompson and Hand but deny the subject-matter jurisdiction as alleged in Paragraph 1 of Plaintiffs' Complaint as such statutes are not applicable herein.

2.

These Defendants admit personal jurisdiction over Defendants Thompson and Hand but deny the subject-matter jurisdiction as alleged in Paragraph 2 of Plaintiffs' Complaint as such statutes are not applicable herein.

3.

These Defendants admit the allegations in Paragraph 3 of Plaintiffs' Complaint.

4.

These Defendants admit that Plaintiffs in Paragraph 4 of Plaintiffs' Complaint are suing under Rules 23 (a) and 23 (b) (2) of the Federal Rules of Civil Procedure. Defendants Thompson and Hand deny that they have acted on grounds generally applicable to the alleged class inasmuch as Plaintiffs here deliberately sought an arrest and it cannot be shown that the alleged class will also deliberately seek arrest or that Defendants Thompson

and Hand will be required to act on warrants sworn by aggrieved citizens; therefore, these Defendants deny that any equitable relief is appropriate as to the alleged class.

5.

These Defendants admit the allegations in Paragraph 5(A) and 5(B) of Plaintiffs' Complaint. These Defendants admit that Plaintiff Atlanta Mobilization Committee is an unincorporated association engaged in educational and organizing efforts to influence and change United States policy in Southeast Asia. These Defendants further show that said Committee engages in other activities, particularly by aligning itself in the national grape and lettuce strikes on the side of the striking grape and lettuce pickers against the grape and lettuce producers, and by selectively boycotting grocery stores which are part of the chain of stores operating in agreement with Colonial Stores, Inc. As to the size of said Committee's membership, these Defendants can neither admit nor deny Plaintiffs' allegation on grounds of lack of sufficient knowledge or belief.

For lack of sufficient information or belief these Defendants can neither admit nor deny the allegations in Paragraph 5(D) of Plaintiffs' Complaint.

6.

Defendants Thompson and Hand admit that Thompson is the Solicitor of the State Court of DeKalb County and that Thompson prosecutes violations of the portion of the statute here in question after a warrant has been sworn and the accused arrested.

Defendants Thompson and Hand admit that Hand is charged with enforcement of the portion of the statute here in question after a warrant has been sworn and given to him or one of his police officers.

Defendants Thompson and Hand, for lack of sufficient information and belief, can neither admit nor deny the allegations in Paragraph 6(C) and 6(D) of Plaintiffs' Complaint.

7.

These Defendants admit the allegations in Paragraph 7 of Plaintiffs' Complaint.

8.

These Defendants admit the allegations in Paragraph 8 of Plaintiffs' Complaint.

9.

These Defendants admit the allegations in Paragraph 9 of Plaintiffs' Complaint.

10.

These Defendants admit the allegations in Paragraph 10 of Plaintiffs' Complaint except that these Defendants deny that Plaintiffs were protected under the guarantees of the First or Fourteenth, or both, Amendments or any other part of the Constitution of the United States, in the acts done by Plaintiffs on October 10, 1970.

11.

These Defendants admit that a warrant was sworn, that Plaintiff Becker was arrested, that she was incarcerated until she was released on two hundred ($200.00) dollar bond which was posted by "Emory Legal Aid" (her own words), that she appeared at a preliminary hearing on Thursday, October 22, 1970, and that she was bound over for arraignment on the first Monday in December, 1970.

12.

For lack of sufficient information and belief these Defendants can neither admit nor deny the allegations in Paragraph 12 of Plaintiffs' Complaint.

13.

For lack of sufficient information and belief these Defendants can neither admit nor deny the allegations in Paragraph 13 of Plaintiffs' Complaint.

14.

These Defendants deny the allegations in Paragraph 14 of Plaintiffs' Complaint as to the purpose of Defend-

ants Thompson and Hand. As to Plaintiffs' information and belief, these Defendants can neither admit nor deny for lack of sufficient information and belief of their own.

15.

These Defendants admit the allegations in Paragraph 15 of Plaintiffs' Complaint.

16.

These Defendants deny the allegations in Paragraph 16 of Plaintiffs' Complaint.

17.

These Defendants deny the allegations in Paragraph 17 of Plaintiffs' Complaint.

18.

These Defendants deny the allegations in Paragraph 18 of Plaintiffs' Complaint.

19.

These Defendants deny the allegations in Paragraph 19 of Plaintiffs' Complaint.

These Defendants further show that Plaintiffs acted in a way so as to invite and welcome an arrest and were acting in bad faith, and have been stubborn and litigious.

20.

These Defendants deny the allegations in Paragraph 20 of Plaintiffs' Complaint.

21.

These Defendants need not deny or admit the statements in Paragraph 21 of Plaintiffs' Complaint.

WHEREFORE, Defendants Thompson and Hand respectfully pray:

I

That this Court refrain from issuing a temporary restraining order as to these Defendants, restraining them in any way in the performance of the obligations, responsibilities and duties of their respective offices as to violations of Ga. Code Anno. Sec. 26-1503;

II

That this Court dismiss Plaintiffs' Complaint and prayer for a temporary restraining order;

III

That this Court refrain from issuing a preliminary and a permanent injunction against the application of Ga. Code Anno. 26-1503 to Plaintiffs and their alleged class, and refrain from enjoining Defendants Thompson and Hand in any way in the performance of the obligations, responsibilities and duties of their offices as to violations of Sec. 26-1503;

IV

That this Court dismiss Plaintiffs' Complaint and prayer for temporary and permanent injunctions;

V

That this Court refrain from declaring Ga. Code Anno. 26-1503 unconstitutional in any way and particularly as applied to the Plaintiffs' activities described hereinbefore;

VI

That this Court dismiss Plaintiffs' Complaint and prayer for declaratory judgment on the constitutionality of Ga. Code Anno. 26-1503 as applied to the Plaintiffs' activities described hereinbefore or as applied in any other way;

VII

That this Court refrain from granting Plaintiffs their costs or any other equitable relief;

VIII

That this Court find that Plaintiffs, or any one of them, have acted in bad faith and have been stubborn and litigious and that Defendants Thompson and Hand are each entitled to reasonable attorneys fees for defending this action, as well as these Defendants being entitled to costs;

IX

That this Court grant Defendants Thompson and Hand their costs and such other and further relief as may be equitable and proper.

Respectfully submitted,

/s/ Robert E. Mozley

/s/ George P. Dillard

/s/ Herbert O. Edwards
Attorneys for Defendants
Thompson and Hand

558 Church Street
Decatur, Georgia, 30030
373-5757

[Verification (Omitted in Printing)]

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14260

SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend; RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend; ATLANTA MOBILIZATION COMMITTEE, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County; F. D. HAND, Chief of the DeKalb County Police; D. SCOTT HUDGENS, JR., d/b/a North DeKalb Shopping Center; and G. T. REYNOLDS, Manager of North DeKalb Shopping Center, DEFENDANTS

ANSWER OF DEFENDANTS HUDGENS & REYNOLDS—
Filed November 9, 1970

FIRST DEFENSE

Plaintiffs have failed to state a claim against Defendants Hudgens and Reynolds upon which relief may be granted.

SECOND DEFENSE

In response to Plaintiffs Complaint, Defendants Hudgens and Reynolds respond as follows:

1.

Defendants deny the allegations of Paragraph One except as to personal jurisdiction over Defendants.

2.

Defendants deny that this court can grant declaratory relief pursuant to jurisdiction conferred upon the court under Title 28 USC 2201 and 2202.

3.

Defendants admit the allegations contained in Paragraph Three.

4.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraph Four.

5.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraphs 5(A), 5(B), 5(C) and 5(D).

6.

Defendants admit the allegations contained in Paragraph 6(A), 6(B), 6(C) and 6(D).

7.

Defendants admit the allegations contained in Paragraph Seven.

8.

Defendants admit the allegations contained in Paragraph Eight.

9.

Defendants deny the allegation that the Plaintiffs activities on October 8, 1970 did not interfere with the selling activities of the shopping center or that there was no littering. Defendants admit all other allegations contained in Paragraph Nine.

10.

Defendants deny: (a) that Plaintiffs on October 10, 1970 between the hours of 10:30 A.M. and 2:30 P.M. distributed handbills "asking persons to boycott lettuce at the Colonial Store;" (b) that the distribution did not

interfere with the selling activities of the shopping center; (c) that there was no littering; and (d) that the Plaintiffs were exercising rights under the First Amendment to the Constitution of the United States. Defendants admit all other allegations contained in Paragraph Ten.

11.

Defendants admit that Plaintiff Becker was arrested and incarcerated until posting a two hundred ($200) dollar bond and that a preliminary hearing was conducted on October 22, 1970. Defendants deny all other allegations in Paragraph Eleven.

12.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraph Twelve.

13.

Due to lack of information and belief, Defendants neither admit nor deny allegations contained in Paragraph Thirteen.

14.

Defendants deny all allegations contained in Paragraph Fourteen, except that Defendants neither admit nor deny the information and belief of the Plaintiffs.

15.

Defendants admit the allegations contained in Paragraph Fifteen.

16.

Defendants deny the allegations contained in Paragraph Sixteen.

17.

Defendants deny the allegations contained in Paragraph Seventeen.

18.

Defendants deny the allegations contained in Paragraph Eighteen.

19.

Defendants deny the allegations contained in Paragraph Nineteen.

20.

Defendants deny the allegations contained in Paragraph Twenty.

WHEREFORE, Defendants Hudgens and Reynolds respectfully pray:

I

That this Court refrain from issuing the temporary restraining order requested by Plaintiffs.

II

That this Court dismiss the Plaintiff's complaint and prayer for a temporary restraining order.

III

That this Court refrain from issuing a preliminary and permanent injunction against application of Ga. Code Annotated § 26-1503 to Plaintiffs and refrain from restraining and enjoining Defendants as requested by Plaintiffs.

IV

That this Court dismiss Plaintiff's complaint and prayer for a temporary and permanent injunction.

V

That this Court refrain from declaring Ga. Code Annotated § 26-1503 unconstitutional as applied to Plaintiffs.

VI

That this Court dismiss Plaintiff's complaint and prayer for a declaratory judgment on the constitutionality of Ga. Code Annotated § 26-1503 as applied to Plaintiffs.

VII

That this Court refrain from granting Plaintiffs their cost or any other relief.

VIII

That this Court grant Defendants Hudgens and Reynolds their costs, including attorney's fees, and such other and further relief as may be equitable and proper.

Respectfully submitted,

/s/ Dock H. Davis

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Phone—762-8663

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ET AL.

versus

JOHN R. THOMPSON, ET AL.

ORDER—January 8, 1971

Presently pending before the court are plaintiffs' prayers for injunctive and declaratory relief.

The court declines to enjoin the prosecution of Sandra Lee Becker pursuant to the holdings of *Atlantic Coast Line R. Co.* v. *Engineers*, 398 U.S. 281 (1970) and; *Mistrot* v. *Wade*, —— F.2d ——, Civil No. 28900 (5th Cir. Nov. 6, 1970).

Further consideration of the cause now pending, including the prayers for declaratory relief by both plaintiffs, is hereby stayed pending the decision of the United States Supreme Court in the following cases either awaiting decision or argument: *Samuels* v. *Mackell*, 39 U.S. L.W. 3014 (U.S. Nov. 16, 1970) (no. 7); *Dyson* v. *Stein*, 39 U.S. L.W. 3017 (U.S. Nov. 16, 1970 (No. 41); *Pacific Indemnity Co.* v. *Acel Delivery Service, Inc.*, 39 U.S. L.W. 3281 (U.S. Dec. 29, 1970) (No. 1119) and; *O'Hair* v. *Paine*, 39 U.S. L.W. 3281 (U.S. Dec. 29, 1970) (No. 1120). The court feels that the decision of the Supreme Court in any or all of these cases will be dispositive of many of the issues herein involved.

Consequently, the case is hereby stayed until further order of the court.

So ordered this the 8th day of January, 1971.

/s/ Albert J. Henderson, Jr.
Judge,
United States District
Court for the Northern
District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ET AL.

versus

JOHN R. THOMPSON, ET AL.

ORDER—January 18, 1971

Plaintiff moves the court to vacate its prior order staying all further proceedings until the disposition of several pending cases by the United States Supreme Court.

The propriety of granting or denying injunctive relief, and the issue of whether consideration of declaratory relief is thereafter permissible are two questions either directly or collaterally involved in the cited cases awaiting decision. In order to properly consider plaintiff's case pursuant to the most recent statements of the law, the court determined that the merits of present action were best resolved subsequent to the decisions referred to above.

Accordingly, the motion of plaintiff is hereby denied.

So ordered this the 18th day of January, 1971.

/s/ Albert J. Henderson, Jr.
Judge,
United States District
Court for the Northern
District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ET AL.

versus

JOHN R. THOMPSON, ET AL.

ORDER—March 19, 1971

By order dated January 8, 1971, this court stayed further proceedings in the above styled case until the United States Supreme Court had opportunity to consider several cases thought to pertain to issues herein relevant. Two of the awaited decisions, *Samuels* v. *Mackell*, 39 U.S. L.W. 4211 (U.S. Feb. 23, 1971) and *Dyson* v. *Stein*, 39 U.S.L.W. 4231 (U.S. Feb. 23, 1971), were recently announced in conjunction with several others, the totality of which makes further staying of this action clearly inappropriate. Accordingly, the issues in this case will be considered in light of the most recent pronouncements of the Supreme Court.

The plaintiffs, in this class action suit, seek to have the court declare unconstitutional, as applied, Ga. Code Ann. § 26-1503 (Acts 1968, p. 1249 *et seq.*); to enjoin the criminal prosecution presently pending against the plaintiffs, Sandra Lee Becker; further, to enjoin future enforcement of said statute as to these plaintiffs; and for a declaration of the plaintiffs' rights in the distribution of handbills in a shopping center. Jurisdiction is based on 28 U.S.C. §§ 1343, 2201 and 2202, and 42 U.S.C. § 1983, *et seq.*

This court denied the plaintiffs' motion for a temporary restraining order, pursuant to a hearing on October 20, 1970. Plaintiffs' motion for preliminary and permanent injunction and declaratory relief came on for hearing on October 28, 1970, at which time all parties to the dispute stipulated their willingness to consider it the final hearing

in the present action. This order is based on the evidence then presented and the stipulation of the parties submitted to the court.

The basic issue presented is the plaintiffs' desire to distribute handbills at the North DeKalb Shopping Center, located in a partially residential, partially commercial area in the unincorporated portion of DeKalb County, Georgia, approximately four miles from the City of Decatur, Georgia.

On Thursday, October 8, 1970, the plaintiffs and others, individually and as representatives of the Atlanta Mobilization Committee, stood on the exterior sidewalk of the North DeKalb Shopping Center and distributed handbills inviting people to "March Against the War" and to abstain from purchasing lettuce at the Colonial Supermarket ("because this inflationary war continues to starve Mexican lettuce pickers"). Pursuant to the shopping center's regulations, adopted shortly after the center's opening in 1965, the center's maintenance man and security guard told the plaintiffs that they would have to cease their distribution and leave. The plaintiffs refused and, in accordance with the guard's standing instructions, the on-site manager was notified. He, in turn, called the DeKalb County Police. The police advised the plaintiffs that they would be arrested should they persist in their actions. In response to this admonition by the police officers, the plaintiffs departed.

The plaintiffs, however, returned on Saturday, October 10, 1970, accompanied by Messers. William Ginilliat and John R. Meyer, staff attorneys for the Emory Legal Services Center. Mr. Meyer brought a camera for the avowed "probability of later use in some litigation." See transcript pp. 30-31. The defendant, Reynolds, explained to Mr. Ginilliat, pursuant to a request for permission, that the center's regulations prohibited the distribution of leaflets on its property. Further, Mr. Ginilliat was informed that if the plaintiffs persisted in their efforts to pass out the leaflets he would have no alternative but to summon the DeKalb County Police.

Despite this warning, and while Mr. Meyer took pictures, the plaintiffs began distributing anti-war leaflets on the sidewalk in front of the Colonial Supermarket. When the manager and security guard discovered that

leaflets were being distributed, the plaintiffs were again advised that their actions were in violation of the regulations of the shopping center, and that they would have to cease their activity or police assistance would be requested. Upon the plaintiffs' refusal, the defendant, Reynolds, called the DeKalb County Police. Although the plaintiffs were told that they would be arrested pursuant to the complaint of the shopping center, the plaintiff, Becker, refused to discontinue her handbilling, and was thereby arrested on a charge of criminal trespass. Ga. Code Ann. § 26-1503. The plaintiff, Steffel, ceased his activity in this regard, allegedly because he did not desire to be arrested under the criminal trespass statute.

The plaintiffs contend that they wish to continue their activities in the distribution of handbills at the shopping center, but will refrain from doing so solely because they fear warrants for their arrest will be sworn out against them, and that they may be arrested and prosecuted for violating the Georgia criminal trespass statute. Those defendants representing the shopping center indicate that they will continue to insist on the strict enforcement of their regulations, and, therefore, will repeatedly summon the police, swear out warrants for the plaintiffs' arrest, and pursue active prosecution under the trespass statute. The state defendants, however, assert that an incident by incident decision will be made based on whether the facts of a particular case show a violation of the law.

This court, in its order dated January 8, 1971, anticipated the subsequent decisions of the Supreme Court when it refused to enjoin the then pending prosecution of the plaintiff Becker. This court cited *Atlantic Coast Line R. Co.* v. *Engineers*, 398 U.S. 281 (1970), which upheld, with ample clarity, the long standing policy of the federal courts to refrain from interfering with the orderly administration of state justice. The correctness of this holding has now been shown by the decision of the Supreme Court in *Younger* v. *Harris*, 39 U.S.L.W. 4201 and 4208 (U.S. Feb. 23, 1971); *Boyle* v. *Landry*, 39 U.S.L.W. 4207 (U.S. Feb. 23, 1971); *Samuels* v. *Mackell*, *supra*; *Perez* v. *Ledesma*, 39 U.S.L.W. 4214 (U.S. Feb. 23, 1971); *Dyson* v. *Stein*, *supra*; and *Byrne* v. *Karalexis*, 39 U.S.L.W.

4236 (U.S. Feb. 23, 1971). In what will undoubtedly become, in years to come, one of the most frequently interpreted judicial phrases, the Court held that,

> . . . [A] federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a *threat of irreparable injury 'both great and immediate'*. (emphasis added).

Younger v. *Harris*, *supra*, at 4208. With reference to whether this court should nevertheless consider Becker's demand for declaratory relief, the following quotation is found dispositive,

> We therefore hold that in cases where the state criminal prosecution has begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by the federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Samuels v. *Mackell*, *supra*, at 4213. Lastly, in finding that the plaintiff, Becker, has not met the prerequisites of "irreparable injury", the court applies the following test to the facts herein,

> . . . [E]ven irreparable injury is insufficient unless it is 'both great and immediate'. *Fenner* v. *Boykin*, 271 U.S. 240 (1926). Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. See, *e.g.*, *Ex Parte Young*, *supra*, at 145-147.

Younger v. *Harris*, *supra*, at 4203.

Based upon these holdings, the court refuses to grant either injunctive or declaratory relief to the plaintiff Becker.

A slightly different question, however, is presented as to the plaintiff Steffel and the other members of the class he seeks to represent, inasmuch as no criminal prosecution is now pending against them. The Supreme Court, while specifically declining to express its view as to the propriety of giving injunctive or declaratory relief from *future* state criminal prosecutions, did state its considered opinion as to when federal intervention is justified.

In the process of distributing and limiting *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), the Court in *Younger* v. *Harris*, *supra*, recognized that there may exist at some time an extraordinary occasion where irreparable injury could be shown in the absence of bad faith and harassment. See, *Watson* v. *Buck*, 313 U.S. 387 (1941), but as to the majority of situations, stated that,

> . . . the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief.

Younger v. *Harris*, *supra*, at 4206. Further, in *Boyle* v. *Landry*, *supra*, the Court refused to consider the plaintiffs' allegations challenging the constitutionality of an uncharged state "intimidation" statute because there was no showing that plaintiffs were in any "jeopardy of suffering irreparable damages if the State is left free to prosecute under the intimidation statute in the normal manner." *Id.*, at 4208. Finally, the Court vacated a district court decision in *Dyson* v. *Stein*, *supra*, which involved, as here, a class action suit, and, the grant of injunctive and declaratory relief. The holding required the lower court to make findings of fact as to a claim of threatened irreparable injury, prior to granting the class any relief.

The impact of these opinions is clearly that the district court must not hypothesize as to what the consequences of a future arrest might be, and that in the ab-

sence of a showing of bad faith enforcement and/or harassment the federal judiciary should refrain from interference in the orderly function of the state criminal process. In the case at bar, no meaningful contention can be made that the state has or will in the future act in bad faith. Rather, it appears that the plaintiffs', by their conduct and the conduct of their attorneys, intended to seek a federal court test. Without the rudiments of an active controversy between the parties, the court finds that the equitable bases for considering this claim to be lacking.

Accordingly, the plaintiffs prayers for injunctive and declaratory relief are denied, and judgment is hereby entered in favor of the defendants.

So ordered this the 19th day of March, 1971.

/s/ Albert J. Henderson, Jr.
Judge,
United States District
Court for the Northern
District of Georgia

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

Civil Action File No. 14,260

SANDRA LEE BECKER, ET AL.

vs.

JOHN R. THOMPSON, ET AL.

JUDGMENT—March 24, 1971

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, denying plaintiffs' prayers for injunctive and declaratory relief,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action is hereby dismissed, and that the defendants, JOHN R. THOMPSON, Solicitor of the Civil and Criminal Court of DeKalb County, F. D. HAND, Chief of the DeKalb County Police, D. SCOTT HUDGINS, JR., d/b/a North DeKalb Shopping Center, and G. T. REYNOLDS, Manager of North DeKalb Shopping center recover of the plaintiffs, SANDRA LEE BECKER, a minor, and LOUIS D. BECKER, as father and next friend, RICHARD STEFFEL, a minor, and RAYMOND C. STEFFEL, as father and next friend, and ATLANTA MOBILIZATION COMMITTEE and on behalf of all others similarly situated, their costs of action.

Dated at Atlanta, Georgia, this 24th day of March, 1971.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 14,260

SANDRA LEE BECKER, ETC., ET AL.

vs.

JOHN R. THOMPSON, ETC., ET AL.

NOTICE OF APPEAL—Filed April 23, 1971

Notice is hereby given that Richard Guy Steffel, one of the plaintiffs above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment denying plaintiff Steffel's prayers for injunctive and declaratory relief entered in this action on the 24th day of March, 1971.

/s/ William R. Gignilliat, III

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Attorneys for Plaintiffs

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1856

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS
RICHARD GUY STEFFEL, PLAINTIFF-APPELLANT

versus

JOHN R. THOMPSON, ETC., ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

OPINION—May 3, 1972

Before TUTTLE, GEWIN and DYER, Circuit Judges.

DYER, Circuit Judge: In this appeal we must meet the issue explicitly reserved in *Samuels* v. *Mackle*, 1971, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688, that is, the propriety of granting declaratory relief when no state criminal proceedings is pending at the time the federal suit is begun. Finding no bad faith enforcement or harassment by the state, the district court denied declaratory relief and entered judgment in favor of the defendants. We affirm.

The facts are undisputed. The action takes place at the North DeKalb Shopping Center. It is a large, modern, retail shopping area located in a partially residential, partially small business area of unincorporated North DeKalb County, Georgia. It contains a large parking lot and a totally covered air conditioned building complex housing more than sixty retail tenants surrounded by a wide exterior sidewalk.

Since its opening in 1965 the Center has enforced its regulations against handbilling because it desired

to maintain an attractive place for its customers to shop without interference or irritation. The Boy Scouts and local garden clubs are permitted to use the booths inside the Mall for bake sales and to give information concerning their activities.

On October 8, 1970, plaintiffs Steffel, Becker and others stood on the exterior sidewalk of the Center and distributed hand bills informing passersby of a meeting protesting the war in Indo-China. The plaintiffs were soon instructed by a Center private security guard that they could not distribute the hand bills and were ordered to leave. When they refused the DeKalb County Police were called. When the police arrived plaintiffs were informed that, if they did not stop distribution of hand bills, they would be arrested. The plaintiffs left and no arrests were made.

On October 10, 1970, an attorney for the plaintiffs asked the manager of the Center to permit them to distribute anti-war handbills. Permission was refused. Nevertheless, Steffel and Becker returned to the Center and again, in an orderly fashion, distributed handbills from the exterior sidewalk while other members of the group made photographs. Steffel and Becker were again advised by the security guard and the Center's manager that they could not distribute the handbills and that, if they persisted in doing so, they would be arrested. Ultimately the DeKalb County police arrived and told Becker and Steffel to discontinue their activity or they would be arrested. Steffel left to avoid arrest. Becker continued to distribute the handbills and was arrested on a charge of criminal trespass, pursuant to the provisions of Ga. Code § 26-1503.[1] Becker was released on bond. Subse-

[1] Ga. Code § 26-1503 provides:

Criminal trespass * * *

(b) A person commits criminal trespass when he knowingly and without authority:

(3) Remains upon the land or premises of another person, or * * * after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor. (Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)

quently a preliminary hearing was held and she was arraigned.[2]

In the court below Steffel testified that he had not returned to the Center to handbill since the time of Becker's arrest because he did not "want to be arrested that badly."

Becker and Steffel filed this civil class action for declaratory and injunctive relief against Hudgins, the owner of the Center, Reynolds, his agent, Solicitor Thompson and Police Chief Hand of DeKalb County attacking the constitutionality of the Georgia criminal trespass statute as applied to them and their class in the distribution of hand bills at the Center, relying on *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 1968, 391 U.S. 308, and *Marsh* v. *Alabama*, 1946, 326 U.S. 501.

The district court denied Becker's prayer for injunctive relief on the basis of *Younger* v. *Harris*, 1971, 401 U.S. 37, and for declaratory relief, on the basis of *Samuels* v. *Mackle, supra*, because of the pending state criminal prosecution against her. No appeal has been taken by Becker.

The district court also denied both the injunctive and declaratory relief sought by Steffel, against whom no state criminal prosecution was pending.

Steffels argument on brief points up the narrow issue presented on appeal as follows:

> The District Court was correct in applying this "bad faith/harassment" test to appellant Steffel's request for injunctive relief against future threatened state court criminal prosecutions. See for example, *Younger* v. *Harris*, 401 U.S. at 44-45 where the Court stated that "These principles made clear in the *Fenner* case [great and immediate irreparable loss required to justify enjoining a state prosecution] have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. (citing

[2] At oral argument the Court was informed that Becker's trial had been indefinitely continued, presumably awaiting the disposition of this appeal.

cases including *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943).

The District Court erred, however, in applying this same stringent test to Appellants' request for declaratory relief. * * * [A] different balance is to be struck concerning questions of federal-state comity where federal declaratory relief is sought and no state prosecution is pending against the plaintiff.

Stated another way, is the propriety of granting a declaratory judgment concerning threatened future criminal prosecution determined by the same test as the propriety of granting injunctive relief, i.e., bad faith harassment? *Younger* v. *Harris*, *supra*. May we transpose to this case, where no state prosecution was pending, what was said about declaratory relief in *Samuels* v. *Mackle*, *supra*, where a state prosecution was pending:

> [T]he same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and * * * where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Id. at 73.

In limine we note that it was emphasized in the "Supreme Court's February sextet"[3] that the resolution of the problems involved when a federal court is asked to give injunctive or declaratory relief from future state criminal prosecution was left to a later day. Thus the court clearly did not determine the propriety of federal declaratory relief against threatened criminal prosecution.

While the question was reserved, *Younger* made it clear beyond peradventure that irreparable injury must be measured by bad faith harassment[4] and such test

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[3] *LeFlore, et al* v. *Robinson*, et al., 5 Cir. 1971, 446 F.2d 715, (Judge Goldberg, specially concurring opinion).

[4] "There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence

must be applied to a request for injunctive relief against *threatened* state court criminal prosecution. In fact, as we pointed out, Steffel concedes that this principle was viable even before *Younger* and was reiterated in it by the Court's reliance on *Fenner* v. *Boykin*, 1926, 271 U.S. 240, and *Douglas* v. *City of Jeannette*, 1943, 319 U.S. 157. These cases underscore that "the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury." *Douglas* at 163, 164.

In *Samuels* v. *Mackle*, *supra*, it was made unequivocally clear that "ordinarily a declaratory judgment will result in precisely the same interference and disruption of state proceedings as the long standing policy limiting injunctions was designed to avoid." *Id.* at 72. This is so, of course, because the declaratory judgment may serve as the basis for a subsequent injunction and "even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would." *Id.* Again the Court reserved the question concerning threatened as opposed to pending state prosecutions.

If the practical effects of injunctive and declaratory judgment remedies are identical because they result in the disruption of a state's enforcement of its criminal statutes when a criminal prosecution is pending, and therefore bad faith harassment must be shown before either remedy may issue, and if, as we have seen, the same test of bad faith harassment is prerequisite to injunctive relief in a threatened criminal prosecution, it follows that a like showing must be made for declaratory relief in a threatened prosecution. Although "The holdings of *Younger* and *Samuels* are narrow [and] limited to the propriety of declaratory or injunctive relief while state criminal proceedings are pending * * * Justice Black's discussion of *Dombrowski* has much broader im-

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of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris*, *supra* at 53-4. We do not find any extraordinary circumstances present here.

plications, suggesting that even when state proceedings have not yet begun, injunctive relief—as authorized by *Dombrowski*—or declaratory relief—as authorized by *Zwickler* v. *Koota*, a 1967 case relying heavily on *Dombrowski*—may be conditioned on the same bad faith requirements. * * * In short, the reasoning in *Younger* would appear to ignore any distinction between pending and threatened proceedings, and make denial of federal relief obligatory in both situations unless bad faith enforcement can be shown." (footnotes omitted) 85 Harvard L. Rev. 304, November, 1971.

In *Wulp* v. *Corcoran*, 1 Cir. 1972, —— F.2d ——, [No. 71-1214, January 11, 1972] the Court, in a threatened state criminal prosecution case, held that declaratory relief was available without a showing of bad faith harassment. It reasoned that there were significant differences in the appropriateness of injunctive and declaratory relief between pending and preprosecution contests. In other words, *Wulp* cannot be read in any way but that it construed the *Younger* sextet to mean that bad faith harassment had to be shown for injunctive or declaratory relief in pending prosecutions, but is not required to be shown for either remedy when the prosecution is threatened but not pending.

In our view this not only effectively overrules *Ex Parte Young*, 1908, 209 U.S. 23; *Fenner* v. *Boykin*, 1926, 271 U.S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 1935, 295 U.S. 89; *Beal* v. *Missouri Pa. R. Co.*, 1941, 312 U.S. 45; *Watson* v. *Buck*, 1941, 313 U.S. 387; *Williams* v. *Miller*, 1942, 317 U.S. 599; and *Douglas* v. *City of Jeannette*, 1943, 319 U.S. 157 but also revives the misconception concerning the broad sweep of *Dombrowski* that *Younger* took pains to point out and disapprove.

It is, of course, self-evident that where state prosecutions were pending *Younger* and *Samuels* established a limitation on the use of the Declaratory Judgment Act, 28 U.S.C.A. § 2201, to those cases where bad faith harassment was shown. The same limitation on the use of the Act necessarily applies in preprosecution cases. It is here that we part company with *Wulp*, *supra*, and Mr. Justice Brennan's views in *Perez* v. *Ledesma*, 401

U.S. 93, et seq. (the majority of the Court not having considered this issue).

Younger laid great stress upon *Buck, supra*, that:

> Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid." *Beal* v. *Missouri Pacific Railroad Corp.*, 312 U.S. 45, 49.

There is, of course, no suggestion that the principles enunciated in *Buck* are not still viable.

If "the propriety of declaratory and injunctive relief should be judged by essentially the same standards", then in pre-prosecution cases there must be a showing of bad faith harassment for the granting of declaratory as well as injunctive relief. *Cooley* v. *Endictor*, 5 Cir. 1972, —— F.2d ——, [No. 71-3207, April 3, 1972].

We conclude that under the circumstances of this case, where no state prosecution was pending against Steffel since there was no showing of bad faith harassment, he was not entitled to a declaratory judgment.

The judgment of the district court is

AFFIRMED.

TUTTLE, Circuit Judge, CONCURRING IN RESULT.

I concur in the result reached by the majority. However, on the facts of this case, I feel that nearly all of what the majority has said is unnecessary to a decision in this case, and is thus obiter dictum. Unlike *Younger* v. *Harris*, 401 U.S. 82 (1971), and its companion cases, the case we have before us does not involve a *pending*

state court prosecution. Nor does it involve a statute which is facially defective in any way; nor does the complaint contain any allegation of "bad faith harassment." Under these facts it is simply unnecessary to speculate on what effect the "February Sextet" had on *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), and its progeny, or in effect, to guess how the Supreme Court would rule on an issue it explicitly stated that it was *not* deciding.[1]

In short, since I feel that under the facts of this case, Dombrowski itself would not justify federal intervention, I decline the invitation to broaden unnecessarily my decision by speculating on what the Supreme Court may or may not ultimately do.

In *Dombrowski* v. *Pfister*, supra, the court held that the allegation of bad faith prosecution stated a claim under 42 U.S.C. § 1983 and that if this allegation was proven to be true, an injunction must be granted. In addition, the court stated that the Louisiana statutes involved in that case were so vague and overbroad as to be highly susceptible to unconstitutional application. Thus, their very existence tended to have a "chilling effect" upon the exercise of first amendment rights involved in that case. The court therefore issued another injunction restraining state officials from enforcing or threatening to enforce the statute involved against anyone until it received a narrowing construction in a state declaratory judgment proceeding. Regarding the propriety of such Federal Court intervention, the court stated:

> "We hold the abstention doctrine is inappropriate for cases as the present one where, unlike Douglas v. city of Jeannette, statutes are justifiably *attacked*

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[1] Justices Stewart and Harlan, concurring, explicitly stated that:

> "Finally, the court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions." Younger, at 55.

In addition, Justices Brennan, White and Marshall, concurring, distinguish Younger from Zwickler v. Koota, 389 U.S. 241 (1967), stating that "in *Zwickler* no state proceeding was pending at the time jurisdiction attached in the federal court," 401 U.S. at 57 (footnote).

> *on their face as abridging free expression or as applied for the purpose of discouraging protected activities.*" 380 U.S. at 489-90.

These same principles were reiterated in *Zwickler* v. *Koota*, 389 U.S. 241 (1967), a case, which like the one at bar, involved the propriety of Federal Court intervention when only a declaratory judgment was sought.

Both Dombrowski and Zwickler require that we do not intervene in the case at bar. We are not dealing with a statute that is facially defective in any way. Moreover, there is nothing in this record that would support a finding that this threatened application of an otherwise valid statute was "for the purpose of discouraging protected activities." (Another way of saying "for bad faith harassment.") Thus, this case seems to fall directly under the Supreme Court's ruling in *Cameron* v. *Johnson*, 390 U.S. 11 (1968). In that case, the Court held that where a challenged state law was not facially defective in any way and the record did not establish any bad faith, this was therefore:

> ". . . not a case in which '. . . a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [appellants] any protection which they could not secure by prompt trial and appeal pursued to this court." Cameron at 620, citing Douglas v. City of Jeannette, at 164.

This is precisely the situation in the case at bar. I, therefore, feel that we do not need to extend Younger. The issue, as I frame it, is fully cognizable within the parameters of what the Supreme Court has already said. To state, as does the majority, that "in this appeal *we must* meet the issue explicitly reserved in *Samuels* v. *Mackle*, 401 U.S. 66 (1971)" is, with deference, in my opinion, simply not the case.

Since, however, the majority has made such a broad pronouncement on the meaning of Younger, albeit in a case where the facts do not justify so broad a decision, I cannot help but note that the conclusion reached seems, to my mind, entirely wrong. Attempting to hold that

even when there is *no state court prosecution pending*, a litigant must show bad faith harassment to give federal jurisdiction in the case of *facial invalidity* of the statute involved, and regardless of the fact that First Amendment rights may indeed be chilled, represents more than the great deference we must and should show to our state court brethren. It represents the abdication of our duty as federal judges where called on to decide what is solely a federal question. Closing yet another federal door in the face of a litigant raising *only federal questions* is, to my mind, federalism turned on its head.[2]

Indeed, as Justice Brennan has pointed out in his concurring opinion in *Perez* v. *Ledesma*, 401 U.S. 82, 104 (1971):

> ". . . *consideration of federalism are not controlling* when no state prosecution is pending and the only question is whether declaratory relief is appropriate. In such a case, the congressional scheme that makes the federal courts *the* primary *guardians of constitutional rights*, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance." (emphasis added.)

Moreover, as the First Circuit stated in a case limiting its application of Younger to situations where prosecutions were actually pending:

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[2] It is interesting to note that in narrowing the number of cases in which removal to the Federal Courts would be granted in Civil Rights cases, Justice Stewart specifically pointed to one remedy this court seeks to cut off today. In Greenwood v. Peacock, 384 U.S. 808, at 829, the Court stated:

> "But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See Dombroski v. Pfister, 380 U.S. 479."

"While Mr. Justice Brennan's views in Perez v. Ledesma, 401 U.S. at 93 et. seq., did not prevail in view of the majority's recognition of a prior pending state prosecution, 401 U.S. at 86, n.2, we cannot dismiss the congressional history reviewed by him, 401 U.S. at 112-15, expressly contemplating resort to the milder, less intrusive, and more timely remedy of a declaratory judgment to test criminal laws, both state and federal. See e.g., Lewis v. Kugler, 446 F.2d 1343, 1347-48 (CA 3, 1971); Anderson v. Vaughn, 327 F.Supp. 101, 102 (D. Conn. 1971) (three judge court). Were the law to be that a plaintiff could not obtain a declaratory judgment that a local ordinance was unconstitutional when no state prosecution is pending unless he could allege and prove circumstances justifying a federal injunction of an existing state prosecution, the Federal Declaratory Judgment Act would have been pro tanto repealed. Wulp v. Corcoran, —— F.2d —— (1st Cir. 1972."

The majority in this opinion attempts to effectuate such a repeal at least as to threatened state criminal prosecutions. It reads Younger and its companion cases as equating declaratory with injunctive relief in entirely different settings. That is to say the practical effects of declaratory relief are supposedly the same as those of injunctive relief even if in one case a prosecution is pending, and in another it is not. Because quite different considerations of federalism are involved when no prosecution is pending, I cannot agree with the majority's equation of these two situations.

Again, as the First Circuit has noted:

"There is a clear and significant difference in the appropriateness of federal relief between pending and pre-prosecution contexts. The policies militating against intervention, canvassed in Younger v. Harris, do not apply at all or apply with greatly diminished strength in the latter context. The traditional restraint of equity, calculated to present erosion of the role of the jury and avoid a duplication of legal

> proceedings is not here present. And considerations of comity do not push nearly so strongly where there is no ongoing state proceeding to be aborted." Wulp, supra, at ——.

In addition, when a statute is being challenged as unconstitutional on its face (I again emphasize that this is not really in issue in this case), a Federal Court is not asked to make findings of fact in place of the state court. Rather, the Federal Court is asked to rule on only federal questions. In such a situation, I point to what the Supreme Court has stated in Zwickler:

> "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility equally with the federal courts . . . 'to guard, enforce and protect every right granted or secured by the Constitution of the United States . . .' Robb v. Connolly, 111 U.S. 624, 637 *'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.*" Zwickler v. Koota, 389 U.S. 241, at 248 citing Stapleton v. Mitchell, 60 F. Supp. 51, 55.

Since this is not a case involving a facially void statute, there must be bad faith harassment to provide federal jurisdiction. Here there was none shown. I think that is all we need say, in AFFIRMING the judgment of the trial court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1856

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS
RICHARD GUY STEFFEL, PLAINTIFF-APPELLANT

versus

JOHN R. THOMPSON, ETC., ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 3, 1972, 5 Cir., 1972, —— F.2d ——).

OPINION—July 20, 1972

Before TUTTLE, GEWIN and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

GEWIN and DYER, Circuit Judges, specially concurring:

The full court has considered the views of Judge Tuttle, expressed in concurrence, and has further considered the suggestion that the panel has been overruled by *Lake Carriers' Association* v. *MacMullan*, 1972, —— U.S. —— [40 U.S.L.W. 4569, May 30, 1972].

Lake Carriers' is an abstention case, and as Justice Brennan points out, "[T]he question of abstention, of

course is entirely separate from the question of granting declaratory or injunctive relief." 40 U.S.L.W. at 4572 n. 13. Significantly, he also points out that in *Lake Carriers'*, unlike *Becker*, there is an "absence of an immediate threat of prosecution." *Id.* at 4572. Justice Brennan's gratuitous statement that, in the absence of pending prosecutions, declaratory relief may be appropriate, is as he indicates, taken from his separate opinion in *Perez* v. *Ledesma*, 1971, 401 U.S. 82, and is pure dicta in *Lake Carriers'*. To suggest that the Supreme Court in collateral dicta in *Lake Carriers'* has decided that the prerequisites to federal intervention defined in *Younger* v. *Harris*, 1971, 401 U.S. 37, do not apply to declaratory judgments against threatened state criminal prosecutions is inconceivable when the issue was so carefully preserved in *Younger* and *Samuels* v. *Mackell*, 1971, 401 U.S. 66, for a time when the point was squarely raised.

The lack of a nod to the *Younger* doctrine by the Supreme Court in its recent decisions in *Police Department of the City of Chicago* v. *Mosley*, 1972, —— U.S. —— [40 U.S.L.W. 4877, June 27, 1972), and *Lloyd Corp., Ltd.* v. *Tanner*, 1972, —— U.S. —— [40 U.S.L.W. 4829, June 20, 1972], is of no moment. The grant of certiorari in each case was specifically limited to constitutional issues other than those raised by *Younger* and its progeny. *See* 1972, 404 U.S. 1037; 1972, 404 U.S. 821.

We underscore our agreement with the dissent that the district courts of this Circuit are entitled to consistent decision making on our part. Since *Younger* and *Samuels* were decided, but prior to the decision in this case, this Court twice held that declaratory relief was inappropriate in cases involving threatened state criminal prosecutions in the absence of proof of *Younger* prerequisites to intervention. *Cooley* v. *Endictor*, 5 Cir. 1972, 458 F.2d 513; *Thevis* v. *Moore*, 5 Cir. 1971, 440 F.2d 1350. Such is the holding of the case *sub judice*. No panel has held to the contrary.[1]

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[1] The dissent's suggestion that the panel opinion is inconsistent with *Hobbs* v. *Thompson*, 5 Cir. 1971, 448 F.2d 456, is inexplicable. *Hobbs* is a civil, not a criminal case, involving no possibility of interference with state criminal proceedings.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BROWN, Chief Judge, with whom WISDOM and GOLDBERG, Circuit Judges, join dissenting from the denial of rehearing en banc:

Because Senior Circuit Judge Tuttle has not participated in the Court's consideration of the petition for rehearing en banc, he does not have an opportunity to respond now to the apparent rejection of the views expressed in his concurring opinion. As one who shares his misgivings, I feel obligated to state concisely my reasons for believing that the present case is enbancworthy.

In effect the Court has held that a Federal declaratory judgment action challenging the constitutionality of a State criminal law is subject to the restrictions imposed by *Younger* v. *Harris*, 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 and companion cases, regardless of whether prosecutions under that law have been initiated. That position has heretofore been rejected by the First,[1] Third[2] and Sixth[3] Circuits and by at least two three-judge District Courts.[4] Its underlying philosophy appears to be at odds with one of our own earlier decisions, *Hobbs* v. *Thompsons*, 5 Cir., 1971, 448 F.2d 456. Moreover, its continuing vitality is somewhat suspect in light of the Supreme Court's recent pronouncement that the reasoning supporting the application of the *Younger* doctrine has "little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." *Lake Carriers' Assn.* v. *MacMullan*, 1972, —— U.S. ——,

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[1] Wulp v. Corcoran, 1 Cir., 1972, 454 F.2d 826.

[2] Lewis v. Kugler, 3 Cir., 1971, 446 F.2d 1343.

[3] Crossen v. Breckenridge, 6 Cir., 1971, 446 F.2d 833.

[4] Anderson v. Vaughn, D. Conn., 1971, 327 F. Supp. 101; Thoms v. Smith, D. Conn., 1971, 334 F. Supp. 1203.

—— S.Ct. ——, —— L.Ed.2d —— [40 U.S.L.W. 4569, May 30, 1972].

Admittedly the Court in *Lake Carriers* was concerned primarily with the problem of abstention and only indirectly with the potential applicability of the *Younger* sextet. However, in a dissenting opinion both Mr. Justice Powell and the Chief Justice concluded that abstention was inappropriate and would have remanded the case for a trial on the merits, thereby negating any inference that they regarded *Younger* as a possible bar to a declaratory judgment in the absence of a pending State criminal proceeding. Since Justices Brennan, White and Marshall have adopted an equivalent point of view,[5] and since Mr. Justice Douglas obviously shares it,[6] I have considerable difficulty avoiding the conclusion that the question which the panel's opinion purports to find "open" is now regarded as closed by two-thirds of the present membership of the Supreme Court.

There is little doubt that the legislative history of the Declaratory Judgment Act of 1934 suggests emphatic Congressional disapproval of the theory that in all circumstances "the Constitution requires litigants to subject themselves to the possible harm of a criminal prosecution before seeking relief from an allegedly unconstitutional statute * * * when actual interference with protected rights is alleged or shown." *Crossen* v. *Breckenridge, supra*, note 3, 446 F.2d at 838 (citation omitted). Judicially imposed limitations on the remedy are appropriate when a State prosecution is already underway because a Federal declaratory judgment action would almost invariably disrupt that proceeding, which by itself provides the defendant with an adequate procedural vehicle for testing the law's constitutionality. *Samuels* v. *Mackell*, 1971, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688. But such considerations are absent when the Federal plaintiff has not yet been arrested or charged and therefore, apart from a declaratory judgment action, has

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[5] Perez v. Ledesma, 1971, 401 U.S. 82, 93, 91 S.Ct. 674, ——, 27 L.Ed.2d 701, 710 (separate opinion by Brennan, J.).

[6] Dyson v. Stein, 1971, 401 U.S. 200, 211, 91 S.Ct. 769, ——, 27 L.Ed.2d 781, 789 (dissenting opinion by Douglas, J.).

no choice but to obey a potentially unconstitutional statute or to disobey it and risk fine or imprisonment on the ultimate outcome.[7] I have most serious reservations about imposing such a dilemma upon those who seek to exercise what they sincerely believe to be their Federal constitutional rights.

Nevertheless, I pass no final judgment on the result reached here. Despite the difficulties raised by the foregoing analysis there may yet be some persuasive justification for the opinion rendered by the Court. All I suggest is that the case obviously involves a problem of exceptional importance which, because of previous uncertainty and apparent inconsistency,[8] requires en banc reconsideration to insure decisional uniformity. Particularly is this true in light of Judge Tuttle's assertion that the availability of a narrower ground for decision reduces most of the panel's opinion to the level of obiter dictum. When issues of such far-reaching significance are at stake, the District Courts of this Circuit are entitled to know precisely what the law is. In its present posture this case simply does not provide that precision.[9]

I dissent from the denial of rehearing en banc.

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[7] "There is indeed a serious present controversy, involving important federal issues, and posing for the Lake Carriers an immediate choice between the possibility of criminal prosecution or the expenditure of substantial sums of money for antipollution devices and equipment which may not be compatible with the federal regulations which admittedly in due time will be pre-emptive. This presents a classic case for declaratory relief * * *." Lake Carriers' Assn. v. MacMullan, *supra*, 40 U.S.L.W. at 4574 (dissenting opinion by Powell, J.).

[8] Compare Hobbs v. Thompson, *supra*, with Musick v. Jonnson, 5 Cir., 1971, 449 F.2d 201 and Cooley v. Endictor, 5 Cir., 1972, 458 F.2d 513.

[9] In two recent decisions involving circumstances virtually identical to those present here, the Supreme Court considered the merits of the constitutional claims without even mentioning the *Younger* doctrine. Police Department of the City of Chicago v. Mosley, 1972, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— [40 U.S.L.W. 4877, June 27, 1972]; Lloyd Corp., Ltd. v. Tanner, 1972, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— [40 U.S.L.W. 4829, June 20, 1972].

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-1856

D. C. Docket No. 14260

SANDRA LEE BECKER, ETC., ET AL., PLAINTIFFS
RICHARD GUY STEFFEL, PLAINTIFF-APPELLANT

versus

JOHN R. THOMPSON, ETC., ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

Before TUTTLE, GEWIN and DYER, Circuit Judges

JUDGMENT—Filed July 31, 1972

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 8, 1972

TUTTLE, Circuit Judge, CONCURRING IN RESULT.

Issued as Mandate: Jul. 28, 1972

SUPREME COURT OF THE UNITED STATES

No. 72-5581

RICHARD GUY STEFFEL, PETITIONER

v.

JOHN R. THOMPSON, ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 26, 1973

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